UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs,	)	
v.	)	Civil Action No. 76-1326
JERRY WILSON, et al., Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW
ON THE ISSUE OF THE AVAILABILITY OF THE DEFENSE
OF GOOD FAITH TO DEFENDANTS

Defendants contend that the defense of good faith or qualified immunity protects them from liability for acts committed by them that violated plaintiffs' constitutional or other rights. Under both the facts of this case and the controlling case law, their assertion of this defense is without foundation. As to both sets of defendants, the threshhold determination is whether, in light of "all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based", Scheuer v. Rhodes, 416 U.S. 232, 247 (1974), defendants undertook the actions in question "in good faith fulfillment of their responsibilities and within the bounds of reason." Wood v. Strickland, 420 U.S. 308, 321 (1975). While the elements of good faith defined by the courts are not identical for the two sets of defendants, neither is in a position validly to assert the defense.

I.

FEDERAL DEFENDANTS' RELIANCE ON THE DEFENSE OF GOOD FAITH OR QUALIFIED IMMUNITY IS INAPPROPRIATE IN THAT THE CHALLENGED ACTIVITIES WERE CLEARLY VIOLATIVE OF RIGHTS AFFORDED PLAINTIFFS UNDER THE FIRST AMENDMENT AND CLEARLY DEFINED AS SUCH AT THE TIME THE CHALLENGED ACTIVITIES WERE IMPLEMENTED.

Evidence adduced from plaintiffs and defendants alike as to plaintiffs' activities establishes beyond a doubt that every phase of those activities and advocacy is

and was protected by the First Amendment. That plaintiffs' activities were so protected and known to be so protected at the time the federal defendants sought to expose, disrupt, or otherwise neutralize them is not subject to question.

The First Amendment guarantees and has guaranteed individuals the freedom to associate for the advancement of common beliefs. NAACP v. Alabama, 357 U.S. 449 (1958). Similarly, the First Amendment protects and has protected their organizing of and peaceful participation in demonstrations. Thornhill v. Alabama, 310 U.S. 88 (1940). This was as clear during the period in question as it is today.

The state of the law then was not only unambiguous as to the existence of the rights in question but also left no doubt that these rights were afforded the highest degree of protection under the First Amendment. Writing for the Court in 1957, Chief Justice Warren observed that

> [h]istory has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957).

Within the context of the instant case, federal defendants are hard-pressed to raise a colorable good-faith defense. In order to do so they must be willing to ignore not only the First Amendment but also the literally hundreds of cases defining with care the scope of the freedoms protected thereunder. Federal defendants cannot ignore the First Amendment and the related case law, engage in actions violative of rights protected thereunder, and then seek to escape liability on the ground that they acted in good faith and with a reasonable belief that such actions were unlawful. */ Bivens v. Six Unknown

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*/ Defendants cannot be heard to argue that the defense is validly asserted because at the time the challenged activities were engaged in, no court had ruled that the COINTELPRO operations were illegal. Obviously, good faith cannot turn on the fact that no court had so ruled given (continued on page 3)

Named Agents, 456 F.2d 1339, 1348 (2d Cir. 1972). To state the argument is to refute it.

II.

FEDERAL DEFENDANTS' RELIANCE ON THE DEFENSE OF GOOD FAITH OR QUALIFIED IMMUNITY IS INAPPROPRIATE IN THAT THE SCOPE AND NATURE OF THEIR OFFICIAL RESPONSIBILITIES WERE NOT OF THE KIND SUBJECT TO THE PROTECTION OF THAT DEFENSE.

Federal defendants have consistently sought to establish through their testimony that each was merely a link in a highly-bureaucratized chain of command, and that in carrying out the challenged activities, each was merely obeying directives and instructions from superiors. If indeed defendants were such ciphers, they are not entitled to the protection afforded by the good-faith defense.

It is quite clear that the law affords special protections to these officials with special responsibilities. Thus, "the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion," the greater the likelihood that the official may avail himself or herself of the defense of qualified privilege. Cf., Barr v. Mateo, 360 U.S. 564, 573 (1959).

The circumstances under which the defense is available have been stated with greater particularity in subsequent case law. Factors to be considered are: whether and the degree to which the official must exercise discretion in conjunction with his job-related tasks, whether they must weigh many factors in performing those tasks, and whether they actively participate in the formulation on long-term policy, and, finally, whether

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(Continued from page 2) the lengths to which federal defendants went to keep the program shrouded in secrecy.

Further, we find it ironic that despite the unambiguous state of the law, defendants claim they had no idea their activities were or might have been unlawful. These same defendants, who apparently are claiming lack of knowledge concerning the existence of the First Amendment, raise the statute of limitations as a bar and urge that plaintiffs knew or should have known of the existence of a hitherto secret government program on the basis of a single court opinion and an article in a weekly publication.

they regularly had to make decisions under circumstances obviously requiring prompt action. Wood v. Strickland, 420 U.S. 308, 318, 319 and passim (1975).

Here, if federal defendants' testimony is taken at face value, the defense of good faith or qualified immunity is unavailable. They sought to establish that they exercised little or no discretion in the performance of their duties and implemented policies only after such were duly approved by superiors. The passing of hundreds of memoranda up-and-down the bureaucratic chain-of-command belies any claim that the federal defendants were regularly responsible for making decisions under circumstances requiring prompt action. Having testified that such were the facts as to the nature of their official functions, federal defendants are no longer in a position validly to assert the defense at issue.

III.

THE DISTRICT OF COLUMBIA DEFENDANTS ARE NOT ENTITLED TO ASSERT THE DEFENSE OF GOOD FAITH OR QUALIFIED IMMUNITY IN THAT THEY KNEW OR REASONABLY SHOULD HAVE KNOWN THAT THE CHALLENGED ACTS VIOLATED PLAINTIFFS' CONSTITUTIONAL RIGHTS.

Those activities engaged in by plaintiffs are, as we have already discussed in Point I at pages 1-3, infra, not only protected by the First Amendment but also entitled to the highest degree of protection pursuant to the amendment and those cases that delineate its scope. There can be no issue that the law was wholly unambiguous in these regards during the period in question.

In carrying out the challenged acts, the District of Columbia defendants deprived themselves of the availability of the good faith defense. Given the instant plaintiffs, the nature of the challenged acts, and the state of the law during the period in question, such conclusion is inescapable.

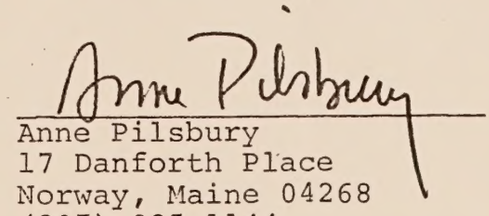
Wood v. Strickland, 420 U.S. 308 (1975), defines those circumstances under which a state or other local official

may justifiably rely on a good faith or qualified immunity defense. The defense is unavailable where the official "knew or reasonably should have known that the action he took ... would violate ... constitutional rights..., or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury...." Id., at 322. Further, and more important, an act in violation of an individual's constitutional rights, committed in ignorance of or with disregard for settled, indisputable law, is not justifiable even if the official was acting sincerely and with the belief that he was doing right. Id., at 321.

Under the instant facts, Wood makes quite clear that the defense is inapplicable. Two facts and two facts alone control: the challenged acts violated plaintiffs' constitutional rights, and the state of the law as to the existence and scope of those rights was settled and indisputable. Thus, it becomes immaterial whether or not the District of Columbia defendants acted in good faith. If such result seems harsh, the consideration is unavailing. As the Wood decision observes, the imposition of that standard of conduct on officials is not "an unwarranted burden in light of the value which civil rights have in our legal system." Wood v. Strickland, 420 U.S. at 322.

Dated: December 14, 1981
Washington, D.C.

Respectfully submitted,



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